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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 652

FARBENFABRIKEN BAYER A.G., *Petitioner*

v.

STERLING DRUG, INC., *Respondent*
(Accounting case)

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 17, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. SINCE THIS CASE INVOLVES AN IMPORTANT RULING IN CONFLICT WITH THE DECISIONS OF THIS COURT, CERTIORARI SHOULD BE GRANTED EVEN IF, AS URGED BY RESPONDENT, RESPONDENT MIGHT PREVAIL ON OTHER GROUNDS NOT RULED ON BY THE COURT BELOW.

The Third Circuit decided this case against petitioner on the sole basis that recovery by petitioner was barred because the 1920 agreement contains provisions violative of the antitrust laws of the United States. No other ground was relied on or even mentioned by the Third Circuit.

Petitioner asked for certiorari because the decision of the Third Circuit is in conflict with the decision of this Court in *Kelly* v. *Kosuga*, 358 U.S. 516, as well as with earlier decisions of this Court, and represents a far-reaching and disturbing precedent affecting international trade.

Respondent's brief in opposition to the petition is not, however, directed to the issues presented by the decision of the Third Circuit. It deals almost entirely with the assertion that certiorari should not be granted because the Court of Appeals could have disposed of this case on other grounds not decided by that Court. This appears to be a recognition by respondent that the decision of the Court of Appeals on the only ground therein relied upon is contrary to the rulings of this Court, as urged in the petition herein. Respondent, apparently not confident of the legal basis for the Third Circuit's decision, argues that the Third Circuit could have decided the case on grounds which would be less likely to be reviewed by this Court. This we submit is nothing more than an attempt to escape the issue presented by this case.

It is plain that the question whether the Third Circuit could have decided this case on other grounds is completely irrelevant to the grant of certiorari. The Third Circuit decided this case on the sole ground that petitioner could not recover because the 1920 agreement contained a noncompetitive provision. It is this decision which establishes a legal precedent dangerous to the security of property rights in international trade. It is this decision which must make foreign companies reluctant to enter into long-term agreements with American firms. For if, contrary to reasonable expectations, at some later date, any provi-

sion of the agreement should be held to violate the antitrust laws, the American partner is free to appropriate all property rights arising or transferred under the agreement. It is this decision which may be turned against American companies when an agreement with a foreign firm is found to violate the newly-enacted antitrust laws of the Common Market, Germany or other countries. It is this decision which is in plain conflict with the line of this Court's decisions culminating in *Kelly* v. *Kosuga, supra.*

It is this decision which requires review. The question whether such review should be granted is one entirely apart from the ultimate right of respondent to prevail upon other grounds.

If, as respondent contends, it should have prevailed on some other ground not relied upon by the Third Circuit, then it should prevail on that ground and not on a ground which is contrary to the decisions of this Court and which establishes a harmful legal precedent. It will have ample opportunity to raise other grounds in its defense after reversal by this Court of the erroneous decision of the Third Circuit and remand for further proceedings.

II. THE GROUND RELIED UPON BY THE THIRD CIRCUIT.

Even with respect to the only ground relied on by the Third Circuit in its decision, respondent does not attempt to support the decision below, but places strong reliance on arguments not considered or decided by the Third Circuit.

A. Respondent urges that there is no conflict with *Kelly* v. *Kosuga, supra,* because this Court's decision in *Kelly* was based on "its refusal to add a new sanction on, i.e., the avoidance of private contracts, to the

antitrust sanctions explicitly set forth in the Sherman Act. . . ." It then states that no new sanction is added here because the 1920 Contract had been avoided by the Consent Decree. (R. Br. 25) The court below, however, in the decision sought to be reviewed made no mention of this point. Sterling ignores the fact that the sanction imposed on petitioner, as expressly stated in the opinion below, is the forfeiture of German Bayer's property rights including, for example, its conceded 75 percent interest in Laboratorios Hegemann. The Court below did not hold that petitioner had no such rights. It said petitioner could not enforce these rights because the 1920 contract contained a provision violative of the antitrust laws.

B. Sterling states that the decision of the Third Circuit is not a precedent for the appropriation of property rights and that it does not present a case of "getting other peoples' property for nothing," (*Kelly* v. *Kosuga*, 358 U.S. 521) because as Sterling claims it has already given back to petitioner everything that petitioner contributed under the 1920 Contract (R. Br. 25, 30).

Sterling, however, has conceded and the Third Circuit found, that it has in fact retained property owned by petitioner—for example, the 75 per cent interest in Laboratorios Hegemann. As stated above, the Third Circuit did not hold petitioner had no claims for property rights but ruled that it could not assert these claims. In the accounting which would take place upon reversal and remand by this Court, respondent may, of course, show that it owes little or nothing to petitioner. But the only issue here is whether petitioner is barred from receiving such an accounting because the 1920 agreement contained a provision violative of the antitrust laws.

III. RESPONDENT WOULD BE MOST UNLIKELY TO PREVAIL ON THE ALTERNATIVE GROUNDS WHICH IT HAS RAISED BUT WHICH WERE NOT CONSIDERED BY THE COURT OF APPEALS

As shown under section I, *supra*, there is no reason for this Court even to consider the alternative grounds on which respondent claims it could have, though it did not, prevail below. As stated above, these questions can and should be raised by respondent in the lower courts upon remand after reversal of the decision below which is in conflict with the decisions of this court. To assure this Court, however, that respondent's prevailing on this alternative grounds is not as it seems to urge a foregoing conclusion but in fact a most unlikely possibility, we should like to comment very briefly on the grounds which petitioner has raised.

1) Most of respondent's brief is devoted to the argument that petitioner is barred from recovery in this action by the Trading With the Enemy Act and by the Bonn Convention. Although these points were raised in both lower courts, neither court saw fit even so much as to comment on these arguments. This is not surprising. Respondent's argument that petitioner's claims are barred by the Trading With the Enemy Act and by the Bonn Convention are both premised upon what are indeed unlikely propositions: These are (1) that under the Trading With the Enemy Act the Government could authorize a private citizen to plunder enemy property, and that the Act was not limited to seizure by the Government, and (2) that the Bonn Convention which restored sovereignty to Germany should be construed to deprive German citizens of pre-existing rights. Merely to state these propositions is to show how baseless they are and how likely it is that they would be rejected if presented, as they should be, to the lower courts on remand.

2) The respondent also relies on the fact that the decision of the District Court held that this cause of action was barred by the Statute of Limitations and Laches. This ground was, of course, not relied upon nor even mentioned in the opinion of the Court of Appeals. That this suit was filed too late contrasts strangely with the previous argument that the suit was prematurely rejected in *Farbenfabriken Bayer A.G.* v. *Sterling Drug Inc.*, 251 F. 2d 300 (3d Cir., 1958), cert. denied, 356 U.S. 957. It is equally baseless.[1]

CONCLUSION

This case presents an important issue arising from a decision below which is in conflict with decisions of this Court. Accordingly, this Court should grant certiorari.

Respectfully submitted,

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[1] This defense was based on the theory that petitioner, as an enemy national, could have maintained this action some time prior to the official termination of the war, in October 1951, pursuant to House Joint Resolution #289, approved on October 19, 1951 and proclaimed by the President of the United States on October 24, 1951, entitled "Joint Resolution to Terminate the State of War Between the United States and the Government of Germany," 50 U.S.C.A. App. preceding Section 1, p. xx. The President's message urging Congress to adopt this Resolution however expressly stated that such a declaration was required to remove "certain disabilities, particularly with respect to suits in the United States Courts." 1951 U.S. Cong. and Admin. Service 867, 868.